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In the Supreme Court of the United States

OCTOBER TERM, 1980

BAXTER RICE, DIRECTOR,
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA, PETITIONER

v.

NORMAN WILLIAMS COMPANY, ET AL.

BOHEMIAN DISTRIBUTING COMPANY, PETITIONER

v.

NORMAN WILLIAMS COMPANY, ET AL.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA,
PETITIONER

v.

NORMAN WILLIAMS COMPANY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a California statute that prohibits a person licensed by the State to import distilled spirits into the State from purchasing or accepting delivery of any individual brand of distilled spirits unless he has been designated as an authorized importer by the brand owner conflicts with Section 1 of the Sherman Act.

2. Whether the California statute is valid under the Sherman Act in any event by virtue of the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943).

3. Whether the California statute is valid in any event by operation of the Twenty-first Amendment to the Constitution.*

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* Questions 2 and 3 need be reached only if the Court were to conclude that the California statute, on its face, conflicts with the Sherman Act. Cf. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103-106 (1980). Because we believe it clear that there is no such conflict, we do not address Questions 2 and 3 at any length.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Section 23661 of the California Business and Professions Code provides that alcoholic beverages may be brought into California from outside the State for delivery or use within the State only if the beverages are consigned to a licensed importer. Cal. Bus. & Prof. Code § 23661 (West Cum. Supp. 1981).[1] Section 23672 of the Business and Professions Code, at issue in this case, provides in pertinent part that "[a] licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." Cal. Bus. & Prof. Code § 23672 (West Cum. Supp. 1981).

This provision, commonly referred to as the designation statute, is the amended version of a statute first enacted in 1973. The 1973 statute provided that any importer wishing to import a particular brand had to be designated as an authorized importer by the licensee (either the brand owner or its California agent; see 80-1012 Pet. 6-7) who filed the minimum retail price schedule for the brand that was then required by state law. 80-1030 Pet. App. 3a-4a; see ch. 707, 1973 Cal. Stats. 1283.

In *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 579 P. 2d 476, 146 Cal. Rptr. 585 (1978), the California Supreme Court held that the State's statutory scheme requiring the filing of minimum price schedules for distilled spirits was invalid

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[1] Section 23775 of the Code provides that an importer's license "shall be issued only to a person or manufacturer who holds a license authorizing the sale for resale [*i.e.*, a licensed wholesaler] of the types of alcoholic beverages mentioned in the importer's license." Cal. Bus. & Prof. Code § 23775 (West 1964).

under Section 1 of the Sherman Act, 15 U.S.C. 1. The California Supreme Court's holding was effectively affirmed by this Court in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), in which the Court held that California's parallel minimum price system for wine constituted resale price maintenance in violation of the Sherman Act. The California Department of Alcoholic Beverage Control interpreted the California Supreme Court's decision in *Rice* to render the designation statute unenforceable. The Department reasoned that because, under *Rice*, no one was required to file a minimum price list for a particular brand, the requirement in § 23672 that a licensed importer could receive distilled spirits from out of the State only if he were designated by the person required to file the minimum price list was of no effect as well. 80-1030 Pet. App. 4a; 80-1012 Pet. 7-8.

2. The Department's conclusion that the California designation statute could not be enforced did not, of course, bar the brand owners themselves from dealing only with certain importers in California or from seeking to limit the number of such importers in California who would handle the brand. However, the brand owners' ability to accomplish this through their own contractual relationships was undermined by the operation of certain provisions of Oklahoma law. The alcoholic beverage laws of that State require any distiller or brand owner that sells to Oklahoma wholesalers to sell to *all* licensed wholesalers on a nondiscriminatory basis. Okla. Stat. Ann. tit. 37, § 533 (West Cum. Supp. 1980). Oklahoma law further authorizes such wholesalers to sell, *inter alia*, to any "qualified persons" out of state. Okla. Stat. Ann. tit. 37, § 521(e) (West Cum.

Supp. 1980). These provisions apparently were understood to bar a distiller or brand owner who wished to sell to Oklahoma wholesalers from insisting that the wholesalers decline to sell to persons who wished to import the liquor into California without authorization from the distiller or brand owner. 80-1030 Pet. App. 4a. Therefore, licensed importers in California who were not authorized by a brand owner to deal in its brand were nevertheless able to obtain supplies through Oklahoma wholesalers. We have been informed that on many occasions liquor orders placed by California importers through Oklahoma wholesalers were shipped directly from the distiller to the California importer, without passing through or coming to rest in Oklahoma. This state of affairs became known as the "Oklahoma connection." Thus, the only way in which the brand owner could have prevented this importation by unauthorized wholesalers in California would have been to refuse to sell its brand to *any* wholesaler in Oklahoma.

Apparently, to meet the conditions created by the unenforceability of the designation statute and the emergence of the "Oklahoma connection," the California Legislature enacted Assembly Bill 499 in 1979 to amend the designation statute effective January 1, 1980. As amended, the designation statute now prohibits a licensed importer from importing any brand of distilled spirits into California unless he has been designated as an authorized importer by the brand owner or the owner's authorized agent.

3. Prior to the effective date of Assembly Bill 499, three licensed but undesignated importers who had been taking advantage of the Oklahoma connection,

together with four affected retailers, filed an application for a writ of mandate in the California Court of Appeal to enjoin enforcement of the new law.

a. The Court of Appeal held that the designation statute, on its face, conflicts with Section 1 of the Sherman Act. The premise of this holding was that the conduct of a brand owner, acting pursuant to the designation statute, in effectively preventing an undesignated California importer from purchasing distilled spirits from an independent Oklahoma wholesaler would constitute a per se violation of Section 1 of the Sherman Act. Thus, the court rejected petitioners' contention that this case is controlled by *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), in which this Court held that vertical territorial restraints should be judged under the rule of reason, rather than under a per se rule of illegality. The Court of Appeal distinguished *GTE Sylvania* on the ground that it involved only "a manufacturer's chosen method of product distribution enforced by a refusal to sell to retailers outside of their assigned territories." 80-1030 Pet. App. 9a. In the instant case, the Court of Appeal observed, the non-designated California wholesalers did not attack the *brand owners'* refusal to trade with them. Rather, the court noted, "they attack the state provided authority of the distillers to prohibit them from trading with *others* [*i.e.*, the Oklahoma wholesalers]." *Ibid.* (emphasis added). The court found this distinction critical, concluding that "[n]othing in *Continental T.V., Inc.* v. *GTE Sylvania Inc.* authorizes a state to delegate such power to a private party." *Ibid.*[2]

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[2] In the same vein, the court below rejected the contention "that brand owners have the inherent power to designate

b. The Court of Appeal also concluded that the designation statute is not within the "state action" exception to the Sherman Act. See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103-106 (1980). The court observed that, although the State licensed the non-designated wholesalers to engage in the importation of liquor, it then left to private parties the "unfettered power to restrain them from engaging in the trade for which they are licensed." The court stressed that the State specifies no standards to be applied by private parties in "reaching their decisions to forbid competition," does not oversee the designations, and does not otherwise participate in the designation function. 80-1030 Pet. App. 10a.

c. Finally, the Court of Appeal concluded that the Twenty-first Amendment does not shield California's designation statute from invalidity under the Sherman Act. Initially, the court stressed that the statute "does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of the channels of distribution" (80-1030 Pet. App. 11a)—the areas that the court found to be at the core of the State's power under the Twenty-first Amendment. *Ibid.*, citing *Midcal*, *supra*, 445 U.S. at 110. In balancing the asserted state interests advanced in support

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importers to whom they will sell and that the designation statute merely recognizes this power." 80-1030 Pet. App. 8a. In the court's view, "[t]he statute goes much further than to merely allow a manufacturer to determine to whom it will sell; it allows the manufacturers to forbid others to sell to a disfavored importer." *Ibid.*

of the statute[3] against the federal interest in favor of free competition expressed in the Sherman Act (see *Midcal, supra*, 445 U.S. at 110-114), the court determined that the state interests were not sufficiently strong to insulate the designation statute from invalidity under the Sherman Act. In the balancing process, the court concluded that the designation statute will not "clearly vindicate" the state interests, and that those interests could be advanced through the alternative means of direct regulation by the State of additional aspects of liquor importation (80-1030 Pet. App. 13a-14a).

The California Supreme Court denied review. 80-1030 Pet. App. 16a.

DISCUSSION

Since the decision below, there have been legal developments in Oklahoma that cast some doubt upon the interpretation of Oklahoma law that underlay the Court of Appeal's conclusion that the California designation statute conflicts with the Sherman Act. The Court may therefore wish to hold the petitions in this case pending a final resolution of the questions of Oklahoma law. Alternatively, the Court may wish to grant the petitions and remand the case to the Court of Appeal for further consideration in light of these

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[3] It was argued that the designation statute would facilitate the monitoring and tracing of imported distilled spirits, aid in the collection of excise taxes, assist in the maintenance of California's three-tier system of distribution, preserve the competitive viability of small retailers, prevent predatory business practices, protect the brand owner's right to its goodwill, promote stable labor relations, and promote temperance. 80-1030 Pet. App. 12a.

and future developments and the views expressed in this brief. Another possibility would be for this Court or the court below to certify the question of Oklahoma law to that State's Supreme Court, in accordance with Okla. Stat. Ann. tit. 20, § 1602 (West Cum. Supp. 1980).

If the Court does not hold the petitions, remand the case to the Court of Appeal, or certify the question of Oklahoma law, summary reversal of the judgment below may be appropriate. The decision of the Court of Appeal holding that the California designation statute conflicts with Section 1 of the Sherman Act is plainly incorrect. Unlike the system of resale price maintenance prescribed by the California statute involved in *Midcal*, which is illegal per se under Section 1 of the Sherman Act, the nonprice vertical restraints that may be facilitated by California's designation statute must be judged under the "rule of reason." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). Only by looking at the circumstances of a particular distiller's—or all distillers'—designation of importers could it be determined whether that conduct unreasonably restrains competition in violation of the Sherman Act. Consequently, the Court of Appeal erred in holding that the designation statute, on its face, conflicts with the Sherman Act. Accordingly, the judgment below should be reversed, and the Court need not consider the application in the present context of the "state action" exemption to the antitrust laws or of the Twenty-first Amendment.

1.a. On March 5, 1981—after the petitions for certiorari in this case were filed—the Attorney General of Oklahoma issued an opinion (No. 81-57) to the Oklahoma Alcoholic Beverage Control Board concluding that the open wholesaling requirements of

Oklahoma law apply only to shipments terminating in Oklahoma.[4] Under the Attorney General's construction, Oklahoma law would not bar distillers or other brand owners from insisting that Oklahoma wholesalers not resell to California importers who had not been designated by the brand owners. If the brand owners imposed such limitations, the "Oklahoma connection" would disappear, and the brand owners therefore would not require the aid of California's designation statute to cut that connection. In these circumstances, the practical impact of the decision below on the importation of distilled spirits into California would be quite limited.

By the same token, if Oklahoma law does not grant an Oklahoma wholesaler an absolute right to ship a particular brand to an unauthorized California importer, the rationale of the Court of Appeal's decision striking down the designation statute is undermined. An apparent premise of that court's decision was that the Oklahoma wholesaler to whom the brand owner sells his product is, as a matter of Oklahoma law, wholly independent of any contractual restraints imposed by the brand owner with respect to the terri-

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[4] The Attorney General reasoned that the Oklahoma liquor laws were intended for the protection of Oklahoma residents and were not intended to afford Oklahoma wholesalers a right to sell liquor to wholesalers in another state in a manner that would be inconsistent with the other state's alcoholic beverage control laws. He further reasoned that whether the out-of-state customer of an Oklahoma wholesaler is a "qualified person" to whom a wholesaler is entitled to sell under the Oklahoma statutes must be determined by federal law and by the laws of the recipient state.

A copy of the Attorney General's opinion has been lodged with the Clerk of this Court.

tory within which it can resell the product.[5] Respondents concede as much. They acknowledge (Br. in Opp. 13-14) that under *GTE Sylvania*, a manufacturer may impose reasonable territorial restrictions on its own franchisee as a condition of doing business and that *GTE Sylvania* "may well allow a distiller to prohibit his own franchisee from reselling his brand to a third party in another state." *Id.* at 13. Thus, respondents' argument that a per se rule of invalidity applies to any efforts by a brand owner to sever an unauthorized California importer's "Oklahoma connection" is based entirely on the premise that, *under Oklahoma law*, the goods must be "legally available" to undesignated California importers irrespective of the brand owner's wishes. *Ibid.*[6] Under the Oklahoma Attorney General's opinion, this premise is incorrect.

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[5] See, *e.g.*, 80-1030 Pet. App. 8a (the Court of Appeal states that the designation statute "gives one private party the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller").

[6] Respondents make this argument by distinguishing Oklahoma wholesalers from franchisees (Br. in Opp. 13-15), apparently on the basis that a distiller must sell to *all* Oklahoma wholesalers who wish to purchase its products and cannot "franchise" or select only certain Oklahoma wholesalers with whom it will deal. But if the Oklahoma Attorney General's interpretation of Oklahoma law is correct, the distiller or brand owner could restrict Oklahoma wholesalers from selling the brand to a person *outside* of Oklahoma, at least where, as here, the law of the state where that person resides prohibits the purchase. So interpreted, Oklahoma law would allow brand owners to adopt what amounts to a franchise system for out-of-state sales and, if they chose, to refuse to "franchise" any Oklahoma wholesaler to sell to undesignated California importers.

b. However, on August 11, 1981, a state district court in Oklahoma entered an injunction permanently restraining the Oklahoma Alcoholic Beverage Control Board from implementing the Attorney General's opinion. *Central Liquor Co.* v. *Oklahoma Alcoholic Beverage Control Board*, No. CJ-81-1413 (Dist. Ct. Okla. Cty).[7] The court concluded that the Oklahoma constitution and statutes require a non-resident distiller to sell to Oklahoma wholesalers even where the Oklahoma wholesalers intend to sell the products to wholesalers in other states. Under the Oklahoma district court's opinion, non-designated California importers will be able to resume their "Oklahoma connection."

We have been informed by the Office of the Attorney General of Oklahoma that the Attorney General has filed an appeal from this decision to the Oklahoma Supreme Court and that an appeal has also been taken by two distillers that intervened in the case. We cannot know, of course, what the outcome of these appeals will be. But because the antitrust issue in this case, as framed by the California Court of Appeal and by respondents in support of the judgment below, depends on interpretations of Oklahoma law that have not yet been finally resolved, the Court may wish to hold the petitions in this case pending a final resolution of the issues of Oklahoma law or to certify the pertinent questions of Oklahoma law to that State's Supreme Court. Alternatively, the Court may wish to grant the petitions and remand the case to the California Court of Appeal for further consideration in light of the recent developments in Oklahoma. The Court of Appeal might then hold the case pending a final resolution

[7] A copy of the court's opinion from the bench has been lodged with the Clerk of this Court.

of the Oklahoma litigation. Even if the Oklahoma Supreme Court were finally to construe Oklahoma law in a manner that leaves the "Oklahoma connection" intact, a remand would allow the Court of Appeal an opportunity to reconsider its holding that the California designation statute conflicts with the Sherman Act. As we explain below, the Court of Appeal's conclusion on that issue was clearly incorrect, and a remand would give the Court of Appeal the benefit of the views expressed herein by the agency charged with enforcing the antitrust laws.

2.a. In considering the Sherman Act issue in this case, it is important as an initial matter to stress the limited reach of the designation statute. That statute provides only that a licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of the brand by the brand owner. The statute does not limit the *number* of importers the brand owner may designate to import its brand. Nor does the designation statute require that a designated importer sell the imported brand to retailers only within a specified territory or from a specified location within the State of California. The statute leaves the brand owner free to confine sales of its brand by each designated importer to a particular location or territory, or to allow them to compete against one another throughout the State. And, finally, the statute does not even appear to require that a designated importer purchase only from the distiller or other brand owner, as the primary source laws of many states require. See note 18, *infra*. A licensed California importer who has been designated by the brand owner to purchase the brand would appear to be free under the designation statute to purchase the brand from a

wholesaler in another state—including, presumably, those in Oklahoma.

As can be seen, the bare statutory requirement that a licensed importer be designated by the brand owner before it can purchase or receive the brand from outside of California does not *require* that any particular type or degree of vertical restraints be imposed by the brand owner; that is a matter for the brand owner to determine, subject of course to whatever restrictions on the distribution of liquor may be imposed by other provisions of California law not at issue here. Viewed in this way, and contrary to the conclusion of the Court of Appeal (80-1030 Pet. App. 8a), the primary thrust of the designation statute merely is to recognize the inherent right of *any* manufacturer to select or franchise wholesalers through whom its products will be sold or distributed.

Because the designation statute does not require a brand owner to impose vertical restraints of a kind that may violate the Sherman Act, the fact that a particular brand owner might abuse its powers in imposing such restraints (and might rely on the designation statute to police them) is not a basis for invalidating the statute on its face. *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 45-46, 52 (1966). In the absence of an inconsistency with federal law, there is no reason to displace valid state interests in regulating liquor that the statutory designation requirement may serve—such as monitoring and tracing of imported distilled liquor, aiding in the collection of excise taxes, or even facilitating the vertical imposition of *pro*-competitive territorial restraints. See 80-1030 Pet. App. 12a. The purposes of the antitrust laws would be fully served by recognizing that the designation statute does not insulate the

brand owner's conduct from scrutiny under the antitrust laws. Indeed, petitioners Bohemian Distributing Co. and Wine & Spirits Wholesalers of California—a licensed importer and an association of such importers and wholesalers, respectively—acknowledge that the designation statute does not compel or authorize conduct that would violate the Sherman Act and expressly *concede* that the statute does not shield a brand owner and its designated importers from accountability under the antitrust laws for the manner in which they structure the distribution of a particular brand. 80-1030 Pet. 10; 80-1052 Pet. 15.[8]

Thus, because the designation statute, unlike the resale price maintenance statute involved in *Midcal*, does not compel the conduct that is asserted in this case to be in violation of the Sherman Act, the Court of Appeal erred for this reason alone in holding that the designation statute on its face conflicts with the Sherman Act and in ordering the Director of the Department of Alcoholic Beverage Control to refrain from enforcing the designation requirement. See 80-1030 Pet. App. 15a. If the Court reverses the judgment below on this ground, respondents of course would remain free to bring an action in federal district court charging a distiller with a violation of the Sherman Act because of the manner in which it utilized its power under the designation statute to impose territorial restraints.

b. The Court of Appeal also erred in concluding that the California designation statute is in conflict with Section 1 of the Sherman Act insofar as it en-

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[8] Petitioner Rice, the Director of the California Department of Alcoholic Beverage Control, does not argue to the contrary in the petition in No. 80-1012. He does not address the point.

ables a brand owner to prevent a California importer who has not been designated by the brand owner from purchasing that product from an Oklahoma wholesaler. As respondents concede (Br. in Opp. 2, 6-17), the court's holding was based solely on its conclusion that this conduct by a brand owner would constitute a per se violation of the Sherman Act.[9] This conclusion is incorrect.

In *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court held that the legality of vertical territorial restrictions, unlike such horizontal restrictions, must be judged under the rule of reason, rather than by application of a rule of per se illegality.[10] Consequently, in the ordinary private set-

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[9] The court did not address any of the economic considerations relevant to a rule of reason analysis, either with respect to the liquor distribution system in California generally or with respect to the vertical restraints imposed by particular distillers. The court did not carefully analyze the statute's impact on either intrabrand or interbrand competition, and it made no analysis of any numerical indicators of market structure at the wholesale level. Similarly lacking is any discussion of evidence relevant to any potential pro-competitive effects of vertical distribution restraints on interbrand liquor competition. For example, the court failed to discuss whether such restraints might entrench current market leaders, or conversely facilitate successful new entry, or have a neutral effect. In short, the court's decision contains nothing that would enable us to venture an opinion in this case on whether any lessening of intrabrand competition in liquor distribution is outweighed by the potential benefits of increased interbrand competition attributable to vertical territorial allocations. That issue is not before the Court, however, because the court below applied a per se rule of illegality.

[10] The basis of this Court's decision in *GTE Sylvania* was that vertical territorial restrictions might in some instances

ting, a manufacturer legally may enforce a vertical territorial allocation through contractual provisions providing for the termination of any distributor that sells outside its territory, as long as the net effect of the practice is not anticompetitive.[11] Thus, putting to one side the effect of Oklahoma law, it is clear that under the Sherman Act, a distiller would be free to authorize only certain wholesalers in California to import and distribute its product and that the distiller could enforce this restriction by prohibiting its wholesalers in other states from selling to unauthorized wholesalers in California, so long as the distiller's restrictions did not impose an *unreasonable* restraint on competition. In the absence of the California designation statute, however, distillers do not have available this private enforcement mechanism to control the distribution of their products in California, because Oklahoma law has been construed to require a distiller to sell to *all* Oklahoma wholesalers without restriction on subsequent sales of the product to unauthorized California wholesalers.[12] Only by not selling in Oklahoma at all could a distiller effectively prevent unauthorized wholesalers in California from importing and distributing its product in California.

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promote interbrand competition—for example by creating incentives to distributors to provide "point-of-sale" services, such as promotional activities, for an individual brand. 433 U.S. at 54-57.

[11] For example, the agreement in *White Motor Co.* v. *United States*, 372 U.S. 253 (1963), rev'g 194 F.Supp. 562 (N.D. Ohio 1961), provided that a distributor could be terminated for selling outside its territory. See 194 F.Supp. at 566-568.

[12] As we have explained in point 1, this interpretation of Oklahoma law is being challenged in the Oklahoma courts.

Thus, the California designation statute merely cancels out the effect of Oklahoma law by restoring to a distiller or brand owner the power that Oklahoma law had taken away: the power to impose territorial restrictions in California by limiting the number of wholesalers who may import and distribute the brand in California. The net result is the same as if neither the relevant provisions of Oklahoma law nor the California designation statute had ever been enacted and the brand owner were free to impose such territorial restrictions through its contractual relationships with wholesalers in Oklahoma.[13] Because under this court's decisions such non-price vertical restraints must be evaluated under the rule of reason, it follows that the court below erred in concluding that a brand owner's actions pursuant to the designation statute that have the effect of barring unauthorized California wholesalers from dealing in its product constitute a per se violation of Section 1 of the Sherman Act.[14]

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[13] Of course, the designation statute gives the force of state law to a brand owner's selection of wholesalers to import its product. This fact alone has no incremental effect on competition, because, as we have explained above (see pages 13-14, *supra*), the designation statute does not insulate that selection from scrutiny under the antitrust laws.

[14] The result is the same even if the California designation statute is analyzed without regard to the provisions of Oklahoma law that apparently led to its enactment. Because vertical territorial restraints might, on balance, actually promote competition in a particular case (*Continental T.V., Inc.* v. *GTE Sylvania Inc.*, *supra*, 433 U.S. at 54-57; see note 10, *supra*), state enforcement of such restraints through a designation statute would in those circumstances further rather than conflict with federal antitrust policy.

The California Court of Appeal, nevertheless, concluded that, in giving the distiller "the unlimited power to tell an independent licensed California buyer that he may not buy from an independent licensed Oklahoma seller," the designation statute confers "a clear power to restrain interstate trade * * *." 80-1030 Pet. App. 8a. But an Oklahoma wholesaler is "independent" of any territorial restraints imposed by a distiller—even those that would be lawful under the Sherman Act under the rule of reason—*only* because Oklahoma law has deprived the distiller of the ability it would otherwise have to impose such restraints in its contractual relations with the wholesaler. The California designation statute eliminates this independence of the Oklahoma wholesaler from the distiller with respect to sales to California wholesalers by affording the distiller a *substitute* for whatever contractual provisions it might otherwise negotiate with Oklahoma wholesalers restricting such sales. The only difference is that the designation statute prohibits unauthorized California wholesalers from purchasing or receiving liquor from an Oklahoma wholesaler, rather than barring an Oklahoma wholesaler from selling or delivering the distiller's brand of liquor to unauthorized California wholesalers, as the distiller might provide in its own contracts with the Oklahoma wholesalers. But because the effect on competition in California is essentially the same, there is no basis for analyzing the former under a rule of reason but subjecting the latter to a per se rule of illegality.[15]

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[15] The court's references to limiting the rights of "independent" buyers and sellers might also reflect sociopolitical concerns that, on occasion, might be inconsistent with promoting competition. Cf. *Continental T.V., Inc.* v. *GTE Sylvania*

3. Because the Court of Appeal erred in concluding that the California designation statute conflicts with the Sherman Act, this Court need not consider whether the statute is insulated from invalidity by the "state action" exemption under the antitrust laws [16] or by the Twenty-first Amendment.[17] And be-

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Inc., supra, 433 U.S. at 53 n.21. The antitrust laws protect competition, not competitors, and it is not always the case that maximizing the number of sellers in a market redounds to the public's benefit. See generally 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 104, at 8-12 (1978).

[16] As we have explained above (see pages 12-14, *supra*), the designation statute itself does not require the conduct that is alleged to violate the Sherman Act in this case—*i.e.*, the failure by distillers to designate certain California wholesalers to sell their products (whether purchased from Oklahoma wholesalers or elsewhere). Thus, if that conduct is found to violate the Sherman Act under the rule of reason or even a per se rule, that conduct is not protected by the "state action" exemption. See *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975); see also *Midcal, supra*, 445 U.S. at 104-106. Similarly, because the conduct at issue here is undertaken as a matter of private volition, the restraints of the Commerce Clause on state action are not pertinent.

[17] Petitioner Rice does not identify in his certiorari petition or reply brief the state interests that are furthered by the designation statute. Nevertheless, we can conceive that California might have a legitimate interest in requiring that wholesalers be designated by a distiller before they may import the distiller's brand, in order to facilitate the monitoring of importation and collection of excise taxes. Moreover, the circumstances of the amendment of the designation statute in 1979, apparently in reaction to the emergence of the "Oklahoma connection," suggest that the statute has the further purpose of facilitating the imposition of territorial restraints by wholesalers because of their possible competitive advantages. But we have considerable doubt that vertical restraints imposed by an individual distiller (and enforced through the designation

cause the error of the Court of Appeal on the Sherman Act issue is sufficiently clear (involving only a straightforward application of this Court's recent decision in *GTE Sylvania, supra*), and because it arises out of a unique factual situation that does not implicate questions of broad importance,[18] the Court may

process) that would be anticompetitive and therefore *violate* the Sherman Act in a particular case would be sufficiently supported by legitimate state interests to be sustained under the Twenty-first Amendment despite the Sherman Act violation. See *Midcal, supra*, 445 U.S. at 110-114. This is particularly so in view of the fact that the designation statute does not require any specific type of vertical restraints and therefore cannot be thought to further any identifiable state interests in affording a distiller a means by which it may facilitate those restraints that prove to be anticompetitive.

[18] Contrary to the contention of petitioners (80-1012 Pet. 28-32; 80-1030 Pet. 2-3, 5, 10-11; 80-1052 Pet. 5 & n.7) and amici state liquor commissions (Br. 3, 13-18), Wine & Spirits Wholesalers of America (Br. 18-20), and United States Brewers Association (Br. 2, 9), we do not believe that the opinion of the California Court of Appeal in this case calls into question the validity of a broad range of state liquor laws, including the "primary source" laws in effect in a number of jurisdictions that require an in-state wholesaler to purchase directly from the distiller. See Appendix E to the petition in No. 80-1052 for a list of such statutes. Although petitioners and amici attempt to analogize California's designation statute to primary source laws, the designation statute does not provide that designated California importers must purchase the brand only from the distiller, as would be the case under a primary source law.

Moreover, the California designation statute does not impose any standards for a distiller's distribution system other than the bare requirement that it formally designate its wholesalers. A primary source law, in contrast, requires a particular method of distribution and therefore more clearly reflects articulated state interests of the kind that may be given appropriate weight under the "state action" exemption and the Twenty-first Amendment.

wish to consider summary reversal of the judgment below.

CONCLUSION

The Court may wish to hold the petitions pending a final determination of the question of Oklahoma law that was critical to the judgment below, or grant the petitions, vacate the judgment below, and remand to the California Court of Appeal for further consideration in light of the recent and future developments in the Oklahoma courts and the views expressed herein. Another possibility would be for this Court or the court below to certify the underlying question of Oklahoma law to the Supreme Court of Oklahoma. Alternatively, the Court should grant the petitions. If it does so, it may wish to consider summary reversal of the judgment below on the ground that the California designation statute does not, on its face, conflict with Section 1 of the Sherman Act.

Respectfully submitted.

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